Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 02-33
Broadband Access to the	)	
Internet Over Wireline	)	
Facilities	)	

Comments of Beacon Telecommunications Advisors, LLC

Beacon Telecommunications Advisors, LLC (Beacon) submits these comments in response to the Commission's Public Notice in the above-captioned proceeding requesting comment on Broadband Access to the Internet over Wireline Facilities.

Beacon is a regulatory, financial, and management consulting firm providing services to independent and tribally owned rural incumbent local exchange carriers (ILECs) throughout the United States. Beacon's clients are small and rural ILECs that are directly impacted by decisions related to the provision of Internet access and Broadband deployment.

Summary of Opinion

Beacon is concerned that the FCC may be reversing its clearly stated position for investment by small, rural ILECs to invest in the infrastructure necessary to support advanced services. Beacon does not believe broadband access to the Internet over wireline facilities should be adopted as an information service, but rather as a *telecommunications access to information* service. Support for this recommendation comes with years of history regarding how end users gain the benefit of having right of entry to the public switched telephone network (PSTN). While these comments directly address broadband access to the Internet over wireline facilities, of which is typically recognized as high-speed, dedicated, or special access, there are important correlations

between how the aforementioned issue relates to end users' ability to have *access* to these services.

FCC Prior Rulings

The FCC and Federal State Joint Board on Universal Service clearly articulated their policy in FCC 01-157 Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256 released May 23, 2001. The following paragraphs are particularly insightful:

> **200. Contrary to the arguments of some commenters, use of support to invest in infrastructure capable of providing access to advanced services does not violate section 254(e), which mandates that support be used "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."[1] The public switched telephone network is not a single-use network. Modern network infrastructure can provide access not only to voice services, but also to data, graphics, video, and other services. High-cost loop support is available to rural carriers "to maintain existing facilities and make prudent facility upgrades."[2] Thus, although the high-cost loop support mechanism does not support the provision of advanced services, our policies do not impede the deployment of modern plant capable of providing access to advanced services. Rural carriers may consider both their present and future needs in determining what plant to deploy, knowing that prudent investment will be eligible for support.[3] The measures that we adopt in this Order will increase incentives for carriers to modernize their plant by increasing the total amount of high-cost loop support available under the cap.**
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> **201. As we move forward in the future, we will consider ways to ensure that we do not create regulatory barriers to the deployment of advanced services. The principal thrust of the "no barriers" proposal appears to be that the Commission should require carriers to deploy plant capable of providing access to advanced services, and encourage them to replace plant that cannot provide such access.[4]**

[1] 47 U.S.C. § 254(e); *see, e.g.*, NYDPS Comments at 5-7.
[2] *First Report and Order*, 12 FCC Rcd at 8939 para. 300.
[3] *Id.* Of course, carriers who make such investments using universal service support also must comply with the mandate that support be used "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 U.S.C. § 254(e).
[4] *See* Rural Task Force Recommendation at 22-23. S*ee also Second 706 Report*, 15 FCC Rcd at 21004 para. 247 ("Because the development of the advanced services market remains in a very early stage, . . . we believe that there is time for us to examine further the factors that affect infrastructure investment and develop policies that will ensure access to needed services, but that are not inappropriately linked to universal service mechanisms for voice telephony"). We note that the Rural Utilities Service makes funding for rural carriers contingent on their use of the funds to deploy plant capable of providing access to

> **Moreover, we believe any specific policies we adopt in this area should apply uniformly to all local exchange carriers, rather than as part of a transitional high-cost support mechanism for rural carriers.[5] Therefore, we believe that the "no barriers" policy as specifically proposed by the Rural Task Force should be considered further in connection with our comprehensive review of the high-cost loop support mechanisms for rural and non-rural carriers. In accordance with our mandate under section 706, we will continue to examine whether deployment of advanced telecommunications capability to all Americans is progressing in a reasonable and timely manner, and to consider means by which we can stimulate the further deployment of access to advanced services.[6]**

(Emphasis added)

As will be shown below, many rural ILECs have already and are continuing to make prudent investments in the infrastructure "capable of providing access to advanced services". As the FCC and Joint Board recognized, one of the primary mechanisms that encouraged these investments was the continuation of the historical stability in the universal service mechanism. For small and rural ILECs this meant the continuation of total (Part 32) regulated embedded costs for determination of the amount of interstate universal service support.

It is understandable that the FCC and Joint Board want to have policy that will "apply uniformly to all local exchange carriers, rather than as part of a transitional high cost support mechanism for rural carriers". Such general policy, however, must not be at the expense of failing to recognize the inherent differences between rural and non-rural local exchange companies, thereby erecting unnecessary "regulatory barriers to the deployment of advanced services." It is also important to note that the 1996 Telecommunications Act differentiated between rural and non-rural local exchange companies, such as in section 253(f) Rural Markets.

If, in order to meet the mandate of Section 706 and the deployment of infrastructure to support access to advanced services in areas served by the larger, non-rural local exchange carriers, a different regulatory scheme is required, there should be no

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advanced services. *See* 7 C.F.R. §§ 1751.100-1751.106. No commenter addressed the Rural Utilities Service's standards or whether they would comport with federal high-cost universal service mechanisms.

[5] *See* Maine and Vermont Commissions Comments at 4 ("According to the Rural Policy Research Institute, for every rural customer served by a 'rural telephone company,' there are four rural customers served by a non[-]rural company").

requirement that the same regulatory regimen apply to small, rural local exchange carriers unless it can be shown that no regulatory barrier is inadvertently erected to the deployment of advanced services. This would clearly hinder the mandate contained in Section 706 that the "deployment of advanced telecommunications capability to all Americans is progressing in a reasonable and timely manner".

Information Service versus Telecommunications Access to Information Service

Since divestiture in the early 1980's, ILECs have in part been compensated through a system known as Carrier *Access* Billing. This system allows end users to access their interexchange and ILEC toll carriers by using the ILECs' local network to originate and terminate toll and other calls to end users nationwide**.** This permits these consumers of telecommunications-related services to have *access* to toll services. Section 254(b)(2)&(3) refers to and addresses "*Access* to Advanced Services" and "*Access* in Rural and High Cost Areas", respectively[7]. In other examples, when companies develop rates included in tariffs that are filed with Federal and State Public Authorities, these tariffs are known as "Local *Access* Service Tariffs", "State *Access* Tariffs", and "Interstate *Access* Tariffs". With each of these illustrations listed above, the common theme and thread is that "*access*" is available to the end user for any given telecommunications service, including a customer's ability to have access to information and information services. In this regard, broadband access to the Internet over wireline facilities should be treated as a "telecommunications access to information" service rather than an "information service". Ultimately, Beacon believes "telecommunications access to information" furnishes the same result as defining broadband access to the Internet over wireline facilities as an "information service": the end user maintains the ability to have access to both telecommunications and information services.

Future Application of Regulations for Broadband Offerings

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[6] *See Second 706 Report*, 15 FCC Rcd at 21003-14 paras. 244-268.
[7] Communications Act of 1934, as amended, Section 254 – Universal Service

In conjunction with broadband access to the Internet over wireline facilities being defined as an information service and therefore not a "regulated" service, Beacon is deeply concerned about the regulatory consequences of such action. One immediate consequence would be the allocation of costs associated with the provision of broadband access to the Internet over the same wireline facilities that provide access to the more traditional services. Clearly the requirements of Section 254(k) mandate that at least some portion of the joint and common costs be allocated to services not included in the definition of universal service. Because of the amount of common and joint costs involved, virtually any allocation to broadband access will be considerable. If the FCC declares broadband offerings as non-regulated services, the FCC may choose to use Part 64[8] as the method to calculate interstate regulated costs. Such an allocation mechanism, however, is not preemptive on state commissions. Therefore, each state commission could design and implement their own allocation mechanism necessary to calculate their intrastate regulated costs. Clearly, some costs could be allocated to broadband services, however, unlike the uniform rules for separating costs between the interstate and intrastate jurisdictions (Part 36), there are no such uniform rules for the allocation of costs to nonregulated services. Since Part 64 is not preemptive, the states could reallocate these costs. Such uncertainty in both the federal and state jurisdictions does little to encourage investment by small and rural ILECs.

With this, Beacon clients are troubled with future repercussions that may ensue should the allocation of other joint and common costs via Part 64 be affected by this proposal. One such further repercussion could be that the FCC and the Federal State Joint Board on Universal Service decide that costs to be used for the calculation of interstate universal service support should include only those costs necessary to support services included in the definition of universal service. If so, costs allocated to non-regulated broadband access to the Internet would not be included. This could cause substantial changes in the amount of federal universal service amounts for small and rural local exchange carriers. Potentially, those ILECs that have deployed the most infrastructure to support such broadband access to the Internet may be the ones primarily at risk. It seems unfair that

[8] Code of Federal Regulations, Title 47, Part 64-Miscellaneous Rules Relating to Common Carriers

those ILECs that invested to fulfill the objectives of Section 706 could end up being the ones most likely to financially suffer for such efforts.

The fact that our clients rely and depend on universal service funding that could vanish with approval of this proposal will have a direct impact on their financial viability as well as their ability to continue as a going concern. For example, if the FCC adopts broadband access to the Internet over wireline facilities as an information service, this definition is not a supportable service under the current Universal Service Fund regime.[9] With this, many ILECs who depend on this funding in the provision of universal service could lose out and ultimately jeopardize not only the FCC's intent to provide basic universal telecommunications service to all Americans, but also the LEC's ability to carry on as a viable business entity. In this regard, defining broadband access to the Internet over wireline facilities as an information service would not serve the public interest.

Lastly, Beacon believes that both independent and tribal rural ILECs should not be penalized for investing in plant that has and will promote the preservation and advancement of broadband services in rural areas. Within this proceeding and NPRM, the FCC has questioned the current cost allocation rules and whether they need modified.[10] Given this, Beacon supports that small and rural ILECs have in good faith worked hard and steadfast to enhance their networks to provide not only higher quality but also additional customer services. In essence, by reallocating joint and common cost away from regulated services to nonregulated services in such a way that the nonregulated revenues cannot support the newly allocated costs, small and rural ILECs will in actuality be penalized for enhancing and upgrading their networks. As stated, this represents a disincentive for rural ILECs to deploy broadband in their operating territories.

Contribution to Universal Service

[9] Communications Act of 1934, as amended, Section 254©(1)
[10] CC Docket No. 2-42, para. 63

As Commissioner Kevin J. Martin details in his separate statement regarding this Notice of Proposed Rulemaking (NPRM),[11] "Placing additional financial burdens on broadband providers only creates barriers to deployment. Such burdens raise costs and decrease demand for broadband, constraining the flow of capital investment and chilling innovation." In support of Commissioner Martin's statement, another consideration relating to this issue is that given the position of additional financial burdens being placed on broadband providers, competition will also be hindered. On the other hand, if more providers of broadband services are required to contribute to universal service funding, the assessments will be smaller and therefore the financial burdens will be lessened. In addition, since the FCC's intent is to promote competition, requiring all broadband providers to contribute to universal service funding mechanisms will strengthen competitive efforts in this area.

In relation to federal statute supporting contributions to universal service, it must be noted that Section 254(b)(4)[12] outlines the requirements of telecommunications providers to contribute: "All providers of *telecommunications services* should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service." Since the FCC is requesting comment on the appropriateness of providers of broadband access to the Internet over wireline facilities to contribute to universal service, but the FCC is also tentatively proposing that the definition of this service is an information service as opposed to a telecommunications service,[13] then wouldn't the FCC be proposing that a smaller number of telecommunications services providers be required to contribute to the fund? In addition, wouldn't this in essence be anti-competitive and increase financial burdens and assessment allocations over a smaller group of providers? Beacon's proposal is that by referring to language included in Section 254(b)(4) that broadband access to the Internet over wireline facilities be considered a "telecommunications access to information" service, all providers should be required to contribute, thereby promoting competition, promoting public interest issues, and lessening assessment allocations for all providers.

[11] CC Docket No. 02-42, "Separate Statement of Commissioner Kevin J. Martin", para. 4
[12] Communications Act of 1934, as amended

National Security, Network Reliability, and Consumer Protection

Without a reliable and dependable network, telecommunications carriers jeopardize the very foundation of national security and consumer protection that the public has grown to rely on. Under the current proposal and the FCC's tentative conclusion that broadband access to the Internet over wireline facilities is an information service, small and rural ILECs cannot be assured that their networks will continually be upgraded and enhanced to provide trustworthiness without appropriate funding mechanisms. Unfortunately, since information services are not currently supported under the provisions of Section 254 of the Act, and are therefore not eligible for federal funding, these types of services cannot be guaranteed to be reliable without on-going necessary network enhancements and upgrades. Furthermore, if joint and common costs of facilities are, per Part 64.901, disallowed inclusion into universal service funding mechanisms, the consequences related to the reliability of national security and consumer protection could be devastating not only to small ILECs, but also to the nation as a whole. The reason for this is straightforward: disallowance of embedded costs, which is the current methodology used to calculate federal universal service funding requirements for small and rural ILECs, will prevent necessary upgrading and enhancement of facilities that is necessary to maintain dependable networks and ultimately to promote universal service.

Responsibility of FCC and States

In relation to the balance and separation of responsibilities given to both the FCC and States as a result of the outcome of this proceeding, Beacon believes an onerous outcome will occur. With regard to the above-mentioned likely results, we believe that classifying broadband access to the Internet over wireline facilities as an information service will create more regulatory prejudice and oversight. Given the argument related to joint and common costs being disallowed from existing universal service funding mechanisms, this

[13] CC Docket No. 02-33, para. 16

will inherently create additional responsibilities of both the federal and state public authorities by the monitoring of Part 64 requirements. In addition, and as mentioned previously, this goes against the theory of regulatory forbearance while also limiting and decelerating the preservation and advancement of universal service.

Implications on Jurisdictional Separations

As noted above, Beacon believes the result of this proceeding, given the FCC's tentative conclusion that broadband access to the Internet over wireline facilities is an information service, will produce unintended and disruptive results concerning jurisdictional separations for our clients. Currently, regulated telecommunications plant by rate of return ILECs, which generally describe Beacon clients, includes both broadband investment and joint and common costs. By virtue of the nature of Part 32, Part 36, and Part 69 FCC rules,[14] Beacon clients have in the past and continue to rely on the existing system and process that have proven to give small and rural ILECs fair and equitable consideration in the determination of their revenues and settlements. Should this investment, or rate base, deteriorate due to regulatory requirements that would cause the exclusion of joint and common costs from traditional regulatory treatment, small and rural ILECs will no longer be able to maintain the level of earnings and cash flow necessary to upgrade and enhance their networks. As noted above, this concept jeopardizes not only the financial viability of rate of return ILECs, but also the integrity of national security, consumer protection, and network reliability.

Impact of Growth on Current Universal Service System

With the addition of Eligible Telecommunications Carriers (ETCs) throughout the United States, it follows suit that at least some, if not most, of these companies either are or will be receiving monies from the current universal service support (USS) system. Given the same funding mechanism and requirements (that is, carriers who qualify for USS will draw down from the fund while the funding mechanism will increase based on a growth

[14] Code of Federal Regulations, Title 47-Telecommunications

in access lines), the current USS system will in all reality continue to grow. The impact of this trend, while inevitable, is not generally quantifiable. Much of the growth of the current system funding requirements depends on the outcome of proposed contribution requirements in this proceeding. As mentioned previously, Beacon believes that having all broadband providers contribute to the universal service fund supports Section 254 of the Act in that all telecommunications service providers are required to contribute.

Conclusion

Beacon recommends the Commission not adopt the definition of broadband access to the Internet over wireline facilities as an information service for the various reasons stated in these comments. Instead, Beacon believes this service should be a regulated *telecommunications access to information* service when considered in the context of how small and rural ILECs are treated. In addition, equitable and nondiscriminatory contributions to universal service funding requirements should be assessed to all telecommunications service providers per Section 254(b)(4). Lastly, due to the likely detrimental consequences concerning jurisdictional separations and the associated additional consequences regarding national security, consumer protection, and network reliability for small and rural ILECs, Beacon firmly believes it is not in the public interest to define broadband access to the Internet over wireline facilities as an information service, and urges the FCC to consider adopting our recommendations.

Respectfully submitted,

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[Filed Electronically]

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